Served: May 27, 1992

NTSB Order No. EA-3576

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-12469

v.

JOHN W. PEARSALL,

Respondent.

OPINION AND ORDER

The respondent, by counsel, has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman issued in this proceeding on April 6, 1992, at the conclusion of an evidentiary hearing at which respondent did not appear either in person or through counsel.[1] By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's airline transport pilot certificate for his alleged violations of numerous Federal Aviation Regulations in connection with his operation of two aircraft that assertedly did not meet

[1]An excerpt from the hearing transcript containing the initial decision is attached.

various maintenance-related requirements.[2] In his appeal, respondent contends, essentially, that the law judge abused his discretion in this matter because he conducted the hearing in respondent's absence when he knew or should have known from information available to him that respondent had not received a notice of the date and place of the hearing.[3] For the reasons that follow, the appeal will be denied.[4]

Before reviewing respondent's specific contentions, we think it appropriate to note that we have found no evidence in the record to support the accusation that the law judge proceeded to hearing with knowledge that the respondent was unaware that the hearing he had requested in this emergency action had been scheduled. Rather, while the law judge may have been mistaken as to all of the facts concerning service of the hearing notice on respondent and as to whether he was, in fact, represented by counsel, we think the record is reasonably clear that the law

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[2]A copy of the Administrator's March 9, 1992 Emergency Order of Revocation is attached.

[3]Respondent also argues that the charges against him should be dismissed as stale under Section 821.33 of the Board's Rules of Practice, 49 CFR §821.33. We need not reach that issue, for a motion to dismiss for staleness that was not filed before or during the hearing will not be entertained on appeal. See Administrator v. Alphin, 4 N.T.S.B. 18 (1982).

[4]The Administrator has filed a reply brief opposing the appeal. He has also moved to strike respondent's submission of supplemental authority, which consists of the citation of a Board case, decided after the hearing in this proceeding, that respondent asserts is pertinent to the issues in this matter. The motion to strike is denied.

judge simply believed that respondent had chosen not to appear at the hearing.[5] This does not mean, however, that we approve of the law judge's decision not to avail himself of an apparent opportunity to find out why the respondent was not in attendance, something he could have easily accomplished by responding to a message he received, just as the hearing was getting underway, from the attorney the law judge thought was representing respondent. To the contrary, we strongly deplore the law judge's decision to remain uninformed on the matter, a choice for which the law judge offered no explanation on the record.[6] At the same time, we are convinced that the law judge's error of judgment in this respect must be deemed harmless because it is clear, for reasons we will now discuss, that respondent's failure to appear is not attributable to anything the Board or the law judge did or did not do, but, rather, to his own failure to take steps to insure that he would receive timely information concerning the appeal he had taken from the Administrator's revocation order.

For various reasons that are not relevant to our disposition here, the Board's Office of Administrative Law Judges believed

[5]In the context of a case in which the respondent had been tardy by three days in appealing the emergency order to the Board and had neglected to file an answer when the order was filed as the complaint in the proceeding, the law judge's conjecture that the respondent had decided to abandon his appeal was certainly not unreasonable.

[6]For all the law judge knew at that point, the respondent could have had a valid excuse for his nonappearance.

that a Mr. Terence R. Perkins of Daytona Beach, Florida would be representing the respondent, a former client, in this matter.[7] As a result, the Board on March 31, 1992, sent, by Federal Express, copies of the notice of the April 6 hearing to both respondent and Mr. Perkins. However, because the Board needed to act quickly to meet the 60-day statutory deadline for deciding the appeal and did not have a telephone number where respondent could be reached, the notice of hearing was directed not to the Post Office Box address that the respondent had asked us to use in his March 24 notice of appeal,[8] but to the address to which the Administrator had mailed the emergency order of revocation.[9]

On receiving the notice of hearing from the Board on April 1, Attorney Perkins, who, like the Board, had no telephone number for respondent, forwarded it to him on April 2 at his Post Office Box address.[10] For reasons that cannot be discerned from the

[7]Among other things, the Administrator's emergency order had been served on Mr. Perkins and respondent's notice of appeal from that order was sent to us in an envelope bearing Mr. Perkins' law firm name and address.

[8]Federal Express will not deliver to a Post Office Box address.

[9]On brief, the Administrator relates that the address used by the Board is the respondent's "most current address on file with the FAA's Airmen Registry at Oklahoma City, Oklahoma." Br. at 10.

[10]Although Attorney Perkins had advised counsel for the Administrator that he would not be representing respondent at the hearing in this matter, counsel for the Administrator indicated that he advised her, and she in turn advised the Board, that "correspondence with Mr. Pearsall could still be sent to him and that he would get it to Mr. Pearsall." See Adm. Br., Appendix 2.

record before us, the copy of the notice of hearing sent by the Board to respondent's residence of record in Daytona Beach was ultimately delivered by Federal Express to his mother in nearby Port Orange, Florida on April 6, the date the hearing was scheduled to begin. Although she immediately relayed the information on the hearing by telephone to respondent, who was in Maryland visiting his sister, he, of course, was unable to attend.[11]

In order to find merit in respondent's contention that his nonappearance at the April 6 hearing "is a direct result of the NTSB's...failure to notify him of the date and location of the hearing" (Br. at 6), we would have to conclude that had the notice of hearing been sent to his Post Office Box in Daytona, he would have received it in time to attend the session. We find no evidence in the record to support such a conclusion. On the other hand, the evidence in the record does suggest that even if the Board had mailed the notice to respondent's Post Office Box address he still would not have received it before the hearing.

(..continued)
Although counsel for respondent seeks to disparage as unreasonable the Board's and the law judge's belief that respondent had retained legal representation in this matter, it is far from clear that Attorney Perkins could not reasonably be considered respondent's agent or his attorney in fact for some purposes, such as for service of documents in this proceeding. Nevertheless, we have not in this case undertaken to treat service on Mr. Perkins as service on respondent.

[11]Respondent, on receipt of the hearing advice from his mother, did contact the Board during the afternoon on April 6 to advise that he had not, before her call, been aware of the date set for the hearing.

In this connection, we note, first, that the notice of hearing forwarded to respondent's Post Office Box address by Attorney Perkins on April 2 was likely to have been delivered to that address before April 6, yet respondent was not aware of the hearing information it contained, presumably because for some period of time before the 6th that is not revealed in the record, he had been out of state.[12] Second, a copy of the Administrator's complaint sent by certified mail to respondent's Post Office Box address on March 26 was returned unclaimed, despite notifications of the certified document placed in the box as early as April 1 and as late as April 16. These circumstances, in our judgment, preclude the inference the respondent would like us to draw; to wit, that he would have received the notice of hearing if the Board had sent it to his Post Office Box instead of to his home.[13]

As it appears that the respondent's failure to appear at the hearing did not result from any error by the Board in serving the notice of the hearing on him, we must reject his request that we

[12]Attorney Perkins, not knowing whether respondent had received the hearing notice he forwarded to him, stopped by the hearing site on April 6 to see if he were there. However, since the hearing had not yet started, he left the message, referred to supra, so that whoever showed up to conduct the hearing could contact him for information if respondent did not appear.

[13]Ironically, it appears but for the Board's service of the notice of hearing on his home address, respondent likely would not have learned of the hearing until considerably later than he did, for at least sending it there resulted in its being forwarded to someone who could get in touch with him.

remand the matter for a new hearing.[14] Moreover, inasmuch as respondent's lack of knowledge concerning the status of his hearing request appears to have been solely the product of his failure to make arrangements to keep himself informed about the progress of his appeal during a period within which he reasonably should have known that documents vital to the protection of his appeal rights might be sent to him, the law judge, had he known the actual reasons for respondent's nonappearance, would not likely have granted a continuance of the hearing until such time as respondent could make himself available. Since a denial of such a request in the circumstances presented would not have amounted to an abuse of discretion, we cannot agree with respondent that the law judge's uninformed, and, arguably, arbitrary decision to proceed in respondent's absence provides a ground for reversal.

ACCORDINGLY, IT IS ORDERED THAT:

The respondent's appeal is denied.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[14]We feel constrained to observe that even if we had been persuaded that some problem with our service on respondent or the law judge's decision to go forward without him justified additional proceedings, they would have been limited to the question of sanction. This is so because respondent in his appeal has made no attempt to establish that the law judge erred in granting a motion by the Administrator to so limit the hearing, in light of respondent's failure to file a timely answer to the complaint.